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In The Supreme Court of the United States

October Term, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS & RESPONSIBILITIES IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

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Amicus Curiae files this Brief in support of Petitioner pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondent have been filed with the Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae American Alliance for Rights & Responsibilities ("AARR") is a national non-profit corporation based in Washington, D.C. AARR's members are individuals dedicated to restoring a sense of responsibility and civic duty in American life. AARR is not affiliated with any political party. Its goal is to re-establish the middle ground in public policy discussions by focusing on the need for balance between rights and responsibilities, rather than the predomination of one over the other.

Substance abuse is one of the primary policy areas upon which AARR currently focuses. For example, it has authored such publications as *The Winnable War: A Community Guide to Eradicating Street Drug Markets* (1991), and has launched the One Church—One Addict program, which gets faith communities involved in assisting those recovering from substance abuse addiction.

AARR works with city officials and community groups to find legal and operational solutions to community problems. In this regard, AARR has been called upon by city officials and community groups throughout the nation to assist them in stemming both the tide of drug use in those communities and the unfortunate problems flowing therefrom.

AARR's active efforts in helping communities to enact and defend constitutional measures aimed at balancing the rights of individuals with the needs of the community will be affected greatly by the Court's decision in this case. As this Court has previously noted, drug use in the schools has become a major social problem. Today, this drug use includes not only the use of illegal drugs such as marijuana and cocaine, but also, in the case of a growing number of student-athletes, the use of painkillers and performance-enhancing drugs. For the public school systems in our country to survive and prosper, school administrators

must have the necessary tools at their disposal to combat this problem. If permitted to stand, the Ninth Circuit's decision in this case will take away one of the most effective tools in combatting drug use among student-athletes—random drug testing. AARR believes that local school administrators must be permitted to adopt and to implement noncriminal, random drug testing programs for student-athletes, so long as the programs contain procedural safeguards such as those present in the instant case.

SUMMARY OF ARGUMENT

In *Acton v. Vernonia School Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit ruled that a school district's random drug testing program for student-athletes was unconstitutional. In so doing, the Ninth Circuit recognized that the school district was faced with a drug problem. Nevertheless, it viewed the student-athletes' privacy rights as tantamount to other important rights and government responsibilities—such as a school district's responsibility to educate its students and to deter drug use among its student-athletes. The Ninth Circuit noted that the presence of "disrespectful, drug-impaired children in our schools is tragic." *Acton*, 23 F.3d at 1526. It erred, however, and applied an incorrect threshold when it concluded that "it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless testing." *Id.*

AARR submits that under the precedent of this Court's decisions, the Vernonia School District's random drug testing program is reasonable and, therefore, constitutional. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Accordingly, this Court should reverse the decision of the Ninth Circuit.

Moreover, AARR submits that the drug problem in our schools is nationwide and that the governmental interests in maintaining an atmosphere conducive to education and in deterring drug use by student-athletes are equal or superior to the governmental interest in, for example, ensuring that customs agents are drug-free. In light of the pervasive drug problem in our schools, and in recognition of the effectiveness of random drug testing as a deterrent, AARR submits that as long as they contain the procedural safeguards such as those used in the Vernonia School District program, random drug testing programs for student-athletes should be constitutionally permissible in any school district in America, even in the absence of a specific finding of a drug problem within a particular school or school district. *See Von Raab*, 489 U.S. at 675 n.3.

ARGUMENT

I. The Substantial Interests Of A School District In Maintaining A Safe And Productive Environment For Education And In Deterring Drug Use By Its Student-Athletes Outweigh The Student-Athletes' Limited Privacy Interests And Render Random Drug Testing Constitutionally Permissible.

This Court has held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. Because the searches at issue in this case are warrantless searches not based on individualized suspicion, the Court now must reach the issue which it expressly reserved in *T.L.O.*—whether there are circumstances, such as those presented in this case, where a school district may institute a random drug testing program (a suspicionless search) in a manner that is "reasonable" within

the meaning of the Fourth Amendment.[1] *See T.L.O.*, 469 U.S. at 342 n.8.

Individualized suspicion is not "an indispensable component of reasonableness in every circumstance." *Von Raab*, 489 U.S. at 665. This Court has recognized exceptions to the requirement of individualized suspicion, especially "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." ' " *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).[2]

Because the type of drug testing policy at issue here is truly random,[3] the Court can focus its inquiry on a balancing of the five "reasonableness" factors this Court has relied upon in determining the constitutionally of similar noncriminal searches: (1) the context in which the search takes place; (2) the societal concerns or governmental interests to be furthered by the search; (3) the effectiveness of the search in furthering those interests; (4) the extent and legitimacy of the expectations of privacy of those to be searched; and (5) the intrusiveness of the search. *See, e.g., Sitz*, 496 U.S. at 451-455; *Skinner*, 489 U.S. at 624-34.

Although the Ninth Circuit in this case recognized the need to utilize such a balancing test, it erroneously held that all other rights and responsibilities must yield to the student-athletes' privacy interests. The court reached this conclusion by improperly tipping its balance through the introduction of a threshold

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[1] It is well established that urinalysis is a search for purposes of Fourth Amendment analysis. *Skinner*, 489 U.S. at 617 (1989).

[2] *See also Michigan State Police v. Sitz*, 496 U.S. 444 (1990) (upholding traffic sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding traffic checkpoints near an international border).

[3] The Ninth Circuit expressly noted that all parties agree that no school official has discretion to pick which individual students will be tested. *Acton*, 23 F.3d at 1522.

requirement that the Vernonia School District establish that "the danger to safety [from drug use in the Vernonia School District] is so high as to be compelling." *Acton*, 23 F.3d at 1527. The Ninth Circuit then set this compelling interest so high that virtually no school district in America could reach it. *Acton*, 23 F.3d at 1526.[4]

The Ninth Circuit justified this "compelling interest" threshold requirement as required by this Court's drug-testing decisions in *Skinner* and *Von Raab*. AARR submits, however, that the Ninth Circuit misread those cases. While the Court clearly found that the government *had* compelling interests to initiate random drug testing in both cases, it did not make a compelling interest a threshold requirement. Rather, this Court required only that the government possess a "legitimate" interest and that a balancing of the reasonableness factors favor testing. *See Skinner*, 489 U.S. at 619. Moreover, because student-athletes possess an even lesser expectation of privacy than did the adult employees at issue in *Skinner* and *Von Raab*, there is no reason whatsoever to hold school districts to a more stringent "compelling interest" test. *See T.L.O.*, 469 U.S. at 340-41; *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (it is "unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.")

AARR submits that the drug testing program in the Vernonia School District clearly passes constitutional muster under the balancing test traditionally applied by this Court, especially in light of the documented drug problem faced by that school district. *See Acton*, 23 F.3d at 1519. This Court can take judicial notice, however, that Vernonia School District is not the

[4]The Ninth Circuit's decision would require a school district to demonstrate that a tragedy proportional to "some shooting, some explosion, some crash of train, truck, or aircraft" had occurred in a particular school district before allowing random drug testing to be instituted. *Acton*, 23 F.3d at 1526.

only school district in America facing a drug problem—the problem is nationwide. *See T.L.O.*, 469 U.S. at 339. While random drug testing is an effective means to identify drug users, it is an equally effective deterrent to drug use. As this Court recently recognized in upholding the constitutionality of random drug testing of custom agents in the absence of a particular drug problem among that group of employees, "preventing an otherwise pervasive societal problem from spreading" is a sufficient government interest to justify random searches. *Von Raab*, 489 U.S. at 675 n.3.[5]

In light of the pervasive drug problem in our schools, and in recognition of the effectiveness of random drug testing as a deterrent, AARR submits that as long as they contain procedural safeguards such as those present in the Vernonia School District program, random drug testing programs for student-athletes should be constitutionally permissible in any school district in America, even in the absence of a specific finding of a drug problem within that particular school district. The analysis of the reasonableness factors below is conducted in the context of this broader proposition.[6]

[5]Moreover, the validity of random drug testing programs should not turn on whether significant numbers of students test positive for drugs. As the Court noted in *Von Raab*, where the government's interest lies in deterring certain conduct, "a low incidence of such conduct, far from impugning the legitimacy of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 675 n.3.

[6]Although the Ninth Circuit implicitly questioned the wisdom of limiting the drug testing program to student-athletes, AARR believes that student-athletes represent a particularly appropriate group for random testing. As the Seventh Circuit correctly recognized in upholding the constitutionality of a random drug testing program for student-athletes that is virtually identical to the program in the Vernonia School District, student-athletes inherently possess a lesser expectation of privacy than do other students. *Schaill v. Tippecanoe Cty. School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988). *See also infra* at pp. 10-11.

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Looking at the first reasonableness factor, the context of the search, the searches at issue are noncriminal searches being conducted in the context of our public schools. This setting provides a uniquely favorable setting for random drug testing. Initially, unlike law enforcement officers who have an adversarial relationship with drug users, school officials have a duty not only to discipline, but also to nurture and to educate, the students for whom they are responsible. *T.L.O.*, 469 U.S. at 336. Furthermore, familiar constraints in both the school and the community provide protection against abuse of students' constitutional rights by school authorities. "[A]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). Further, the "openness of the public school and its supervision by the community afford significant safeguards" against a violation of a student's constitutional rights. *Id.; see also T.L.O.*, 469 U.S. at 349 (Powell, J., concurring). In short and in sum, the fact that it will take place in the context of a school setting favors the constitutionality of a random drug testing program for student-athletes.

Second, the governmental interests at stake here are maintaining a safe and productive environment for educating our children and deterring drug use by our student-athletes. As Justice Powell recognized in his concurrence in *T.L.O.*, "[t]he primary duty of school officials and teachers . . . is the education and

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(Continued)

In fact, athletes at the college, Olympic and professional levels already are subject to highly-publicized, suspicionless drug testing. Moreover, because of the added pressures on student-athletes to perform despite injuries and to use performance-enhancing drugs, these students are particularly susceptible to drug use. Thus, AARR agrees with the Seventh Circuit that student-athletes are a particularly appropriate, discrete group for testing.

training of young people. A State has a *compelling interest* in assuring that the schools meet this responsibility." *T.L.O.*, 469 U.S. at 350 (emphasis added). Justice Blackmun concurred in this regard, "[e]ducation 'is perhaps the most important function' of government . . . and government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

The government's interest in deterring the use of drugs among students in general, and student-athletes in particular, is equally compelling. Studies show that the illegal drug use among high school age students is at epidemic levels and expanding.[7] Furthermore, studies indicate that between 250,000 and 500,000 high school age students have used or are using performance enhancing drugs.[8] It is not surprising, therefore, that many states have recognized that their responsibility to educate our children includes a duty to prevent the spread of drug use. *See, e.g.*, Cal. Health & Safety Code §11998.1 (1994); 1994 Conn. Legis. Serv. §221 (West 1994); 14 Del. Code Ann. §3806 (1993); Mo. Rev. Stat. §161.506 (1993); N.Y. Law Educ. §912-a (Consol. 1994); 35 P.S. §807.1 (1993); Tenn. Code Ann. §49-6-4213 (1994). Against this backdrop, AARR submits that the government has a substantial interest, if not a duty, to identify those in our schools with drug problems and to deter the problem from spreading.

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[7] *See, e.g.*, University of Michigan Institute for Social Research, *Monitoring the Future* (press release, Dec. 8, 1994) (tracking, *inter alia*, the expansion of drug use among teenagers from 1991 through 1994).

[8] William E. Buckley, et al., *Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors*, 260 Journal of the American Medical Ass'n, 3441, 3445 (Dec. 16, 1988) (finding that 6.6 percent of 3400 male 12th grade students in 46 public and private high schools surveyed use or have used anabolic steroids); *see also* Ellen Flax, *250,000 Teenagers Have Used Steroids, Number May Be Growing, Students Find*, Education Week, Sept. 19, 1990, at 6.

Third, as to effectiveness of random drug testing of student-athletes, even the Ninth Circuit admitted that such a program is effective in identifying and deterring drug use. *Acton,* 23 F.3d at 1522. Moreover, the best cure for any epidemic is prevention. To anyone who has ever been an adolescent in America, two things are clear. First, peer pressure is a powerful force. Second, the fear of getting caught and/or of suffering severe embarrassment is one of the only forces stronger than peer pressure. Random drug testing gives student-athletes a badly needed tool to empower them with the inner strength they need to say no to drugs and to overpower the formidable opponent of peer pressure. The District Court in this case noted that, "[t]he testimony of Dr. DuPont was particularly persuasive on the significant deterrent effects that a random drug testing program can have on a youthful population." *Acton v. Vernonia School Dist. 47J,* 796 F. Supp. 1354, 1363 (D. Or. 1992).

Fourth, as to the extent and legitimacy of the expectations of privacy of student-athletes, these expectations are, as noted in *T.L.O.*, lesser than those of the general population simply because these individuals are students. Further, this group of students voluntarily subjects itself to extensive regulation, observation and testing. As the Seventh Circuit explained in upholding the random drug testing of student-athletes in *Schaill*, there is an element of "communal undress" inherent in all participation in athletics. Physical examinations, including urine samples for purposes other than drug testing, are common. *Schaill,* 864 F.2d at 1318. Surely, student-athletes have no greater expectation of privacy for the illegal drugs in their urine than they do for the blood-sugar level in that same urine. In addition, given the highly publicized knowledge that college, Olympic, and professional athletes are required to submit to drug testing to ensure fair competition, "it [is] quite implausible that students competing for positions on an interscholastic athletic team would have

strong expectations of privacy with respect to urine tests." *Schaill,* 864 F.2d at 1319.[9]

Finally, as to the intrusiveness of random urinalysis, with proper testing procedures such as those present in the Vernonia School District program, the intrusion into privacy is minimized and entirely reasonable. *Von Raab,* 489 U.S. at 671, 672 n.2. Policies such as the one at issue here minimize the intrusiveness of the search to the greatest degree possible. Students are selected at random, and thus, the testing brings with it no accusation, presumption or shame. The students are not subject to direct scrutiny while producing a specimen. Even though, in the case of the boys, an administrator is in the room, he is 12-15 feet away and the boys turn their backs to the administrator; the circumstances are not unlike those all males face whenever urinating in a public restroom. Similarly, female students provide specimens in closed stalls, without observation. Additionally, the urine specimens are tested only for illegal drugs, not medications. Finally, the results are not used for criminal enforcement purposes; the worst that can happen to any student is suspension from the school's athletic programs for a period of time. In short, the intrusion to the student-athletes' limited expectation of privacy is minimal.

School boards generally are elected by communities; these communities entrust their children's safety and education to these boards and school administrators for several hours each day. These local officials are in a unique position to determine whether a random drug testing program will assist school officials within a given school district in educating its students and

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[9]The Seventh Circuit in *Schaill* examined the "special characteristic" of athletics and made a clear distinction between the testing of athletes and the testing "of band members or the chess team." *Id.* As noted *supra* at p.7 n.6, AARR accepts that distinction in light of the added pressures for student-athletes to use drugs and the reduced expectation of privacy this group of students possesses.

in deterring drug use among student-athletes. Furthermore, school officials can be trusted not to use drug testing programs for illegitimate reasons and can be assumed to have the safety and well-being of the students as their primary concern.

As to student-athletes—who face added pressures to use drugs and possess limited expectations of privacy—the balance of the reasonableness factors clearly tips in favor of permitting a random drug testing program, even if the school district in question has yet to identify a drug problem among its student-athletes. This Court should not deprive local school administrators of this valuable weapon in deterring the spread of the drug abuse epidemic. *A fortiori*, the program in Vernonia School District—where a specific drug problem among student-athletes was identified—should be upheld as constitutional.

II. Even If This Court Were To Apply A Compelling Interest Test, Public School Districts Still Possess A Sufficient Interest To Justify Random Drug Testing Of Student-Athletes.

As noted above, AARR believes that this Court's precedents require only a legitimate, not a compelling, interest—coupled with an appropriate balancing of the reasonableness factors analyzed by this Court in the other suspicionless search cases—in order to justify random drug testing. Even if the Ninth Circuit was correct in applying a compelling interest test, however, random drug testing programs for student-athletes are nevertheless constitutional.

The principal problem with the Ninth Circuit's compelling interest analysis is that it set the compelling interest standard beyond reach. Although admitting that prolific illegal drug use is "a tragedy of national proportions," the Ninth Circuit's decision would require a school district to demonstrate that a tragedy

proportional to "some shooting, some explosion, some crash of train, truck, or aircraft" had occurred in a particular school district before allowing random drug testing to be instituted. *Acton*, 23 F.3d at 1526. Under that analysis, it is doubtful that a single death, or even multiple deaths, in a school district would satisfy the Ninth Circuit's implausible standard. In setting such a test, the Ninth Circuit has ignored both the teaching of this Court's decision in *T.L.O.* and today's reality that drug abuse in our schools is a tragedy on par with those cited by the Ninth Circuit as compelling enough to justify random drug testing. *Von Raab*, 489 U.S. at 674 ("drug abuse is one of the most serious problems confronting our society today").

Without reiterating the above discussion of the governmental interests in conducting random drug testing, (*see supra*, pp. 8-9), school districts' interests in educating our children and in deterring young athletes from drug use clearly are as compelling as the governmental interest recognized by this Court in *Van Raab* as sufficient to justify random drug testing. Thus, even under a compelling interest test, random drug testing of student-athletes—even in the absence of an identified drug problem among the student-athletes in a particular school district—is constitutionally permissible.

CONCLUSION

For all the foregoing reasons, Amicus Curiae American Alliance for Rights & Responsibilities respectfully urges this Court to reverse the decision of the Ninth Circuit in this case and to uphold the constitutionality of random drug testing programs for student-athletes in public schools.

Respectfully submitted,

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